Leg
0399/78

18 May 1978

MEMORANDUM FOR THE RECORD

STAT FROM : [redacted]
Assistant General Counsel

SUBJECT : S.2525 - Submissions to Congress Prior to Effective Date

1. I spoke on 17 May with Steve Frank at the Justice Department's General Litigation Division concerning the "Nixon tapes" case and a recent newspaper reference to DOJ's "acknowledgement" of the unconstitutionality of the one-house congressional veto. (Copy attached) The reference was based, he said, upon part of an Answer filed by DOJ in that case and the issue had not yet been briefed.

2. We discussed the portions of S.2525 which were of general concern in this area and he advised, although he was not in a position to state DOJ's official position on the issue, that they did not oppose statutory provisions such as these which merely require a "layover" period in the Congress with no specific authorization for a one-house veto or a contra-resolution. The type of provision which DOJ argues is unconstitutional is that which allows Congress to disapprove executive branch actions in such a way as to not be subject to Presidential veto. They see no problem where Congress is required to be informed and merely allows itself a period of time within which to enact legislation to prevent or modify executive proposals.

3. He suggested further questions in this regard be addressed to Larry Simms, in DOJ's Office of Legal Counsel (739-3712), and promised to send me a copy of DOJ's brief on the one-house veto when it is filed.

SIGNED

[redacted] STAT

Att

STAT cc: OLC [redacted]

Court Bars Access to Nixon Tapes

Terms of Release Left to Congress, Executive Branch

By Morton Mintz
Washington Post Staff Writer

The Supreme Court yesterday removed any possibility of swift public access to White House tape recordings played at the Watergate cover-up trial of aides to former President Nixon.

The justices voted 7 to 2 to reverse a lower-court ruling that the common-law right of access to judicial records allows release of the 30 tapes for copying for broadcasts and for sale as phonograph records and cassettes.

The terms of public access should be decided by Congress and the executive branch, not the courts, the majority held.

The basis for the decision was the majority's reading of a 1974 law directing the General Services Administration to take custody of the mountain of papers and tapes from the 5½-year Nixon presidency, remove personal and private items, and determine the rules of public access to the rest.

Congress passed the law because it did not want to entrust the millions of documents and hundreds of hours of White House tape recordings to Nixon's care.

Court release of materials subject to the law "might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons," Justice Lewis F. Powell Jr. wrote in the opinion for the court.

This interpretation of the law came as a surprise. Nixon's attorneys had conceded that the law didn't apply. Powell himself described it as "an additional, unique element that was neither advanced by the parties nor given appropriate consideration" by the U.S. District Court and the Court of Appeals for the District of Columbia, both of which ruled against Nixon.

In a dissenting opinion, Justice Thurgood Marshall wrote, "Nothing in

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the act's history suggests that Congress intended the courts to defer to the executive branch with regard to these tapes."

The other dissenter, Justice John Paul Stevens, made the same point by citing the law as stated in the Senate report on it: "to provide as much public access to the materials as is physically possible as quickly as possible."

The decision does not rule out possible eventual release of the 22 hours of tapes that were admitted into evidence, at the Watergate cover-up trial, heard by spectators through earphones, and heavily reported in the press.

Instead, the decision has the effect of lumping these tapes with all of the other materials covered by the 1974 law. Implementation of the law is bogged down in litigation initiated by Nixon against the GSA.

A key issue in the litigation, which may be years away from resolution, is the so-called one-house veto, a legislative device that enables either the House or the Senate to block regulations it opposes.

The 1974 law directed the GSA to draft regulations for public access to the whole array of Nixon materials, subject to a one-house veto within 90 legislative days.

In initial draft regulations rejected by Congress, the GSA tried to block or delay commercial use of the tapes. Such use, said a House report, is a "risk of a free society" and "a risk the Founding Fathers accepted in adopting the free speech protections of the First Amendment. . ."

Finally, the agency obtained approval by submitting regulations that would allow reproduction of the trial tapes. The GSA published the rules last Dec. 16.

In January, however, Nixon filed a court paper alleging that the entire package of regulations was invalid because it derived from a law embodying a one-house vote. On April 14, the Justice Department—counsel for the GSA—said it "acknowledges" the unconstitutionality of the one-house veto.

Congress, however, acknowledges no such thing; it has continued to incorporate the veto into various laws.

If either the House or Senate intervenes in the case, the issue probably will be litigated up to the Supreme Court.

There, the justices recently declined to review a ruling upholding a one-house veto law affecting the pay of federal judges, including themselves. This did not impair their freedom to decide the constitutional issue either way.

The seedbed of the case was the three-month cover-up trial, which ended Jan. 1, 1975, with the conviction of former Attorney General John N. Mitchell and former top Nixon aides H.R. Haldeman and John D. Ehrlichman.

During the trial, the three commercial television networks, the Radio-Television News Directors Association, the Public Broadcasting System and Warner Communications Inc., all requested permission from Judge John J. Sirica to copy the tapes. He referred the request to Judge Gerhard A. Gesell.

Gesell, citing the practice of making court exhibits available that "reaches far back into our common law," held that the tapes should be released, but without "overcommercialization." The trial having ended, he referred the matter back to Sirica.

Sirica ruled that immediate release might prejudice the appeals of the convicted defendants, possibly with "mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales."

The appeals court reversed, ordering immediate release. It stressed the traditional privilege of inspecting and copying judicial records, said that the mere possibility of prejudice to the defendants didn't outweigh the public's right of access, and held that the lower court had abused its discretion in interfering with this right.

Joining Justice Powell in the opinion for the court were Chief Justice Warren E. Burger and Justices Potter Stewart, Harry A. Blackmun and William H. Rehnquist. All but Stewart were named to the bench by Nixon. Justice Byron R. White, joined by Justice William J. Brennan Jr., dissented in part to Powell's opinion but agreed with the decision.